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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/1/2016
ABEL ACOSTA, CLERK

MICHAEL JOSEPH BIEN

Appellant,

v.

THE STATE OF TEXAS

Appellee.

STATE'S BRIEF ON THE MERITS
AFTER GRANTING OF DISCRETIONARY REVIEW

Petition for Discretionary Review from:
Eleventh Court of Appeals – Cause Nos. 11-14-00057-CR & 11-14-00058-CR

Appeal from:
35th District Court – Cause Nos. CR22319 & CR22320

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ORAL ARGUMENT NOT GRANTED

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The Honorable Stephen Ellis
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STATEMENT OF THE CASE

Appellant was convicted of Attempted Capital Murder and Criminal Solicitation by a jury on February 20, 2014. C.R. p. 162 – CR22319; C.R. p. 162 – CR22320.

On March 3, 2016, the Eleventh Court of Appeals found that the convictions violated Appellant's double jeopardy rights and reversed the conviction for attempted capital murder while retaining the criminal solicitation conviction. *Bien v. State*, --- S.W.3d ---, 2016 WL 859378 at *4, 7 (Tex. App.—Eastland March 3, 2016, pet. granted).

Both Appellant's Petition for Discretionary Review and the State's Petition for Discretionary Review were granted on September 14, 2016.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted by this Court.

ISSUES PRESENTED

3. Did the Eleventh Court of Appeals err by holding that convictions for criminal solicitation and attempted capital murder violate double jeopardy when significant factors indicate a legislative intent to punish these offenses as separate steps in the continuum of a criminal transaction?

4. Assuming a double jeopardy violation, who should determine what the most serious offense is? If this Court answers that question by deciding that a court of appeals should make that determination, what role should the parole consequences of Article 42.12 §3g have in that analysis when the sentences, fine and restitution are all identical?

STATEMENT OF FACTS

Lori Box married Appellant the day after she graduated from college in 1999. R.R. Vol. 10, pp. 114-15. In August of 2011, after having two children and suffered 12 years of abuse, Lori divorced Appellant. R.R. Vol. 10, pp. 113, 179-81.

In late March of 2012, Appellant called a long-time friend, Mickey Westerman, to find someone to kill Lori. R.R. Vol. 5, p. 91; R.R. Vol. 7, pp. 58-59. Westerman advised law enforcement of the call and began working undercover with several Texas Rangers. R.R. Vol. 5, p. 91; R.R. Vol. 7, pp. 67-68.

Appellant continued to discuss killing someone in Lori's family with Westerman over a period of several weeks. *See* R.R. Vol. 5, pp. 124-66; R.R. Vol. 7, pp. 68-71.

For about six months between May and November of 2012, Appellant went to jail for the offense of terroristic threat. Vol. 5, pp. 166-71; R.R. Vol. 7, pp. 95-99. On November 25, 2012, the day Appellant was released from jail, he called Westerman to ask Westerman to find a "hit man." R.R. Vol. 5, pp. 169-71; R.R. Vol. 7, pp. 97-98.

Appellant then met with Westerman on the 27th of November and told Westerman that Appellant wanted to kill a member of Lori's family as "fucking flat-ass revenge." R.R. Vol. 5, pp. 193, 206; State's Exhibit 14.[1]

A DPS agent working undercover as a "hit man" met with Appellant on December 1st to discuss Appellant's plan. R.R. Vol. 5, pp. 222-26; State's Exhibit 18.[2] On the 7th, after Appellant had acquired funds to pay the "hit man," the DPS agent met with Appellant again. R.R. Vol. 6, pp. 32-40; State's Exhibit 22.[3]

[1] State's Exhibit 14 is located with the Reporter's Record under a file named "Brown-CR22319-RR-Part009-SX14." The written section of this portion of the transcript is also available in Volume 13 of the Reporter's Record as Court's Exhibit 1, p. 13, "Transcription of AudioVideo Bien 11/27/2012."

[2] State's Exhibit 18 is located with the Reporter's Record under a file named "Brown-CR22319-RR-Part013-SX18." A transcript of State's Exhibit 18 is available in Volume 13 of the Reporter's Record as Court's Exhibit 1, "Transcription of Audio UC meet with Bien 12/1/12."

[3] State's Exhibit 22 is located with the Reporter's Record under a file named "Brown-CR22319-RR-Part015-SX22." A transcript of State's Exhibit 22 is available in Volume 13 of the Reporter's Record as Court's Exhibit 1, "Westerman picks up Bien 12/7/12."

During the meeting on the 7th, Appellant began by asking the agent to kill Lori's brother and make the kill look like a robbery. State's Exhibit 22.

After the DPS agent confirmed with Appellant that Appellant was asking the agent to kill Lori's brother, Appellant then paid the agent $1,000 to hire the agent as a "hit man." State's Exhibit 18. Appellant was then placed under arrest. State's Exhibit 18.

SUMMARY OF THE ARGUMENT

Legislative intent is absolutely determinative of whether offenses are the same for purposes of Double Jeopardy in a multiple punishments context. Because the elements of criminal solicitation and attempted capital murder are different under *Blockburger* in this case, a judicial presumption arises that the legislature did intend to authorize multiple punishments.

There is not sufficient evidence to show that the legislature intended to only authorize one punishment, and therefore this presumption cannot be rebutted in this case. Evidence of legislative intent in this case includes: (1) different gravamen of the offenses as determined by considering the "eighth grade grammar rule" and case law; (2) the legislature's focus on more than a single instance of conduct by codifying criminal solicitation and criminal attempt in two separate statutory provisions; (3) the offenses involved are not only in separate section of

the code, but also include separate chapters as well; (4) the offenses are not phrased in the alternative; and (5) the different range of punishments possible.

Even if the analysis of these factors ends up inconclusive, the presumption that the legislature intended to authorize multiple punishments would remain unrebutted and no Double Jeopardy violation can be found.

Even if a Double Jeopardy violation is found, sound policies support either remanding a case to a trial court to allow a prosecutor to elect which offense is the most serious, or at a minimum, allowing an appellate court to consider the parole implications created by Section 3g of Article 42.12 of the Code of Criminal Procedure in determining the "most serious offense." Either of these methods would avoid arbitrary rules, promote consistency, be applicable in all cases, and would most protect and support the public and victims.

ISSUE ONE

The Fifth Amendment's Double Jeopardy Clause prohibits the government from subjecting a person to be put in "jeopardy of life or limb" twice for the same offense. U.S. CONST. amend. V.; *Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013). The Double Jeopardy Clause therefore protects a defendant from the imposition of multiple punishments for the same offense. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015).

However, the Supreme Court has steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause. *Garrett v. U.S.*, 471 U.S. 883, 790 (1985). Instead, "sameness" in this context is purely a matter of legislative intent. *Gonzales v. State*, 304 S.W.3d 838, 845 (Tex. Crim. App. 2010).

With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Legislatures, not courts, prescribe the scope of punishments. *Id.* at 368.

Furthermore, there is nothing in the Constitution which prevents a legislature from *punishing separately each step leading to the consummation of a transaction* which it has the power to prohibit and punishing also the completed transaction. *Garrett*, 471 U.S. at 779 (emphasis added).

Legislative intent should be regarded as absolutely determinative. *See Gonzales*, 304 S.W.3d at 847.

How to Determine Legislative Intent[4]

How legislative intent is ascertained depends in part on whether the offenses at issue are codified in a single statute or in two distinct statutory provisions. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015). When two distinct statutory provisions are at issue, the offenses must be considered the same under both an "elements" analysis and a "units" analysis for a double-jeopardy violation to occur. *Id.*

"Elements" Analysis

In performing an "elements" analysis, the elements of the offenses being compared are derived solely from the pleadings and the relevant statutory provisions. *Id.* at 73. A reviewing court should begin with the *Blockburger* same-elements test when performing an "elements" analysis if two separate statutes are involved. *Id*. at 72.

The *Blockburger* test has been used as the traditional indicium of legislative intent. *Gonzales*, 304 S.W.3d at 845. However, the *Blockburger* test is only a tool of statutory construction – an accused may be punished for two offenses even though they would be regarded as the same under a *Blockburger* analysis if the Legislature has otherwise made manifest its intention that he should be. *Id.*

[4] The State has included in the Appendix a diagram of how to determine legislative intent that visually summarizes the complex area of law involved in this case. The diagram is drawn from *Ex parte Benson*, this Court's most recent and thorough explanation of how to conduct a Double Jeopardy analysis in a multiple punishments context.

The *Blockburger* test asks "whether each provision requires proof of a fact that the other does not." *Ex parte Benson*, 459 S.W.3d at 72. The application of this test is governed by the cognate-pleadings approach, which entails comparing the elements of the greater offense as pleaded to the statutory elements of the lesser offense. *Id*.

If two offenses, so compared, have the same elements, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and the defendant may not be punished for both. *Id*. This presumption can be rebutted by a clearly expressed legislative intent to impose multiple punishments. *Id*.

Conversely, if the two offenses have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double jeopardy purposes and cumulative punishment may be imposed. *Id*. This presumption can be rebutted by a showing, through various factors, that the legislature "clearly intended only one" punishment. *Id*.

Assuming that a reviewing court finds different elements under the *Blockburger* test, *Ex parte Ervin* set out a non-exclusive list of factors to consider in determining whether the legislature intended only one punishment:

(1) whether offenses are in the same statutory section or chapter;
(2) whether the offenses are phrased in the alternative;
(3) whether the offenses are named similarly;
(4) whether the offenses have common punishment ranges;

(5) whether the offenses have a common focus or gravamen;
(6) whether the common focus tends to indicate a single instance of conduct;
(7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and
(8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Id.* at 72-73.

"Units" Analysis

Even when the offenses in question are the same under an "elements" analysis, the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution. *Id.* at 73.

A "units" analysis consists of two parts: (1) what the allowable unit of prosecution is; and (2) how many units have been shown. *Id.* The first part of this analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. *Id.* at 73-74. The second part requires an examination of the trial record, which can include the evidence presented at trial. *Id.* at 74.

"Elements" Analysis Applied – Blockburger *Test*

Appellant was convicted under separate statutes. *See* Tex. Pen. Code §§15.01, 15.03 & 19.03 (West 2015). The Eleventh Court of Appeals therefore

correctly began its analysis with the *Blockburger* test. *See Bien v. State,* --- S.W.3d ---, 2016 WL 859378, at *2 (Tex. App.—Eastland March 3, 2016, pet. granted). The court also correctly held that under *Blockburger*, the two offenses have different elements.[5] *See id*.

[5] The court of appeals did commit one error in its *Blockburger* analysis, but the State does not believe this error affects the outcome. *Ex parte Benson* makes it clear that under *Blockburger* the reviewing court should compare the elements as indicted of the greater offense to the statutory elements of the lesser offense. *See Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015). The court of appeals only compared the elements of both offenses as indicted. *See Bien v. State,* --- S.W.3d ---, 2016 WL 859378, at *2 (Tex. App.—Eastland March 3, 2016, pet. granted).

However, had the court of appeals correctly compared the elements of the greater offense as indicted with the statutory elements of the lesser offense, they still would have reached the same conclusion.

Assuming that the greater offense is criminal solicitation, the elements as indicted are: (1) Appellant; (2) on or about the 7th day of December, 2012; (3) in Brown County; (4) with intent that capital murder be committed; (5) capital murder is a capital felony; (6) did request, command or attempt to induce; (7) Stephen Reynolds; (8) to engage in specific conduct; (9) to kill Koh Box; (10) for remuneration; and (11) Appellant believed the circumstances surrounding the conduct of Appellant or Stephen Reynolds would have constituted capital murder. *See* C.R. p. 162 – CR22320. The statutory elements of attempted capital murder are: (1) a person; (2) on or about a date; (3) in a county; (4) with specific intent to commit capital murder; (5) did an act amounting to more than mere preparation; and (6) the act tended but failed to effect the commission of capital murder. *See* Tex. Pen. Code §§15.01 & 19.03 (West 2015).

When the indicted elements of criminal solicitation are compared to the statutory elements of attempted capital murder, the analysis under *Blockburger* should still conclude that there are different elements in each offense. Although the first four elements are the same, the rest of the elements differ. Even assuming for purposes of argument under a liberalized *Blockburger* approach that the elements in criminal solicitation requiring proof of a request, command or attempt to induce Stephen Reynolds to kill Koh Box could be considered the same as the element in attempted capital murder requiring proof that a person did an act that amounted to more than mere preparation, the last elements of each offense differ so greatly that they cannot be construed as similar.

Particularly, as indicted, criminal solicitation requires proof of some promise or actual remuneration and proof that Appellant believed that the circumstances surrounding his conduct or the conduct of the undercover agent would have constituted capital murder. Statutorily, attempted capital murder does not require proof of a promise of or actual remuneration (an intent to have someone killed for remuneration is not the same thing as actually promising or providing remuneration) nor does attempted capital murder have any element requiring proof of a person's perception of the circumstances. Instead, attempted capital murder requires that the act committed tended but failed to effect the commission of capital murder. Therefore, even assuming a liberalized *Blockburger* standard with criminal solicitation as the greater offense, the elements in each case are different in this case.

On the other hand, assuming that the greater offense is attempted capital murder, the elements as indicted are: (1) Appellant; (2) on or about the 7th day of December, 2012; (3) in Brown County; (4) with specific intent to commit the offense of Capital Murder of Koh Box; (5) did do an act; (6) employed Stephen Reynolds; (7) to kill Koh Box; (8) by remuneration or the promise of remuneration; (9) the act amounted to more than mere preparation; and (10) the act tended but failed to effect the commission of the offense intended. *See* C.R. p. 162 – CR22319. The statutory elements of criminal solicitation are: (1) a person; (2) on or about a date; (3) in a county; (4) with intent

Where the Eleventh Court of Appeals' erred in its analysis was failing to follow the correct procedure once it determined that each offense contained different elements under *Blockburger*. The court of appeals did not acknowledge or give any weight to the judicial presumption that arose once the court determined that the two offenses had different elements. *See id.* at *2-4.

The court simply jumped from a *Blockburger* analysis to a consideration of the *Ervin* factors. *See id.* at *2-3.

However, skipping this presumption caused the court to apply the *Ervin* factors without the proper framework. *Ex parte Benson* held that the presumption created by the different elements can only be rebutted by showing that the

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that a capital felony or a felony of the first degree be committed; (5) requested, commanded, or attempted to induce another; (6) to engage in conduct; and (7) that under the circumstances surrounding the actor's conduct as the actor believed them to be, the conduct would constitute the intended felony or would make the other a party to the commission of that felony. *See* Tex. Pen. Code §15.03 (West 2015).

Again, even though the first four elements are the same, there are differences between the other elements. Attempted capital murder's requirement that the State prove that Appellant employed Stephen Reynolds to kill Koh Box by remuneration or promise of remuneration is not the same as requiring proof that a person requested, commanded, or attempted to induce someone else to engage in conduct. Even assuming for the sake of argument that under a liberalized *Blockburger* analysis these elements could be considered the same, other elements are still different for each offense.

Attempted capital murder as indicted requires proof that Appellant's act of employing Stephen Reynolds amounted to more than mere preparation and that the employment of Stephen Reynolds tended but failed to effect the commission of the capital murder of Koh Box. Whereas the criminal solicitation statute requires proof that under the circumstances surrounding a defendant's conduct as the defendant believed them to be, the conduct solicited would either constitute the intended felony or would make the other person a party to the commission of that felony.

Therefore, whether a reviewing court compares the elements of criminal solicitation and attempted capital murder from both indictments or compares the indicted elements of the greater offense with the statutory elements of the lesser offense, the result of even a liberalized *Blockburger* analysis should be that each offense contains different elements.

legislature "clearly intended only one" punishment. 459 S.W.3d 67, 72 (Tex. Crim. App. 2015). [6]

The court of appeals should have required the factors it examined to clearly show that the legislature intended only one punishment before setting aside one of Appellant's convictions.

"Elements" Analysis Applied –Other Factors that Show Legislative Intent

The non-exclusive factors contained in *Ervin* are designed to assist courts in the absence of clear guidance from the legislature. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014).

Of all of the *Ervin* factors, the "focus" or "gravamen" of a penal provision should be regarded as the "best" indicator of legislative intent. *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010).

Gravamen of the Offenses

There are three possible categories of gravamen as it relates to the orientation of the offense: (1) the result of the conduct, (2) the nature of the conduct, or (3) the circumstances surrounding the conduct. *Loving v. State*, 401

[6] *Ex parte Benson* was issued by this Court after the parties filed their briefs with the court of appeals but well before the court of appeals issued its decision. Therefore, the court of appeals should have properly followed the binding authority set out in *Ex parte Benson.* The court of appeals was aware of *Ex parte Benson* as it cited to the case in its opinion. *See Bien v. State*, --- S.W.3d ---, 2016 WL 859378 at *3 (Tex. App.—Eastland March 3, 2016, pet. granted).

S.W.3d 642, 647 (Tex. Crim. App. 2013). Statutory language controls whether a crime is conduct-oriented, result-oriented, or circumstance-oriented. *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011).

A result-oriented offense is concerned about the product of certain conduct, regardless of the specific manner in which that product is obtained. *Id*. For a conduct-oriented or "nature of conduct" offense, it is the act or conduct itself that is punished, regardless of any result that might occur. *Id*.

For a circumstances-oriented offense, the focus is on the particular circumstances that exist rather than the discrete, and perhaps different, acts that the defendant might commit under those circumstances. *Id.* at 424.

How to Determine the Gravamen of an Offense

Grammar may aid in determining the focus or gravamen of a statute. *Jones v. State*, 323 S.W.3d 885, 890 (Tex. Crim. App. 2010). Sentence syntax and whether a statute refers to an item in the singular or plural (usually the direct object) can help in that analysis. *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013); *Jones*, 323 S.W.3d at 891.

Under the "eighth grade grammar" rule, the subject, the main verb, and the direct object constitute the gravamen of the offense. *Jones*, 323 S.W.3d at 890-91.

Adverbial phrases and prepositional phrases are generally not the gravamen of the offense. *Id.* at 891.

Gravamen of the Offenses in This Case

The Eleventh Court of Appeals held that both criminal solicitation and attempted capital murder are conduct oriented offenses, and that in this case each offense focused on a single instance of conduct. *See Bien v. State*, --- S.W.3d ---, 2016 WL 859378, at *3 (Tex. App.—Eastland March 3, 2016, pet. granted).

However, the court of appeals' decision did not consider the "eighth grade grammar" rule at all during their analysis. *See id.*

Had the "eighth grade grammar" rule been properly applied, the court of appeals should have held that the gravamen of each offense was different.

The subject of the criminal solicitation statute is "a person." *See* Tex. Pen. Code §15.03(a) (West 2013). The verb is "requests, commands, or attempts to induce." *See id.* The direct object is "another." *See id.*

The phrase "to engage in specific conduct" is a prepositional phrase and therefore not the gravamen of the offense. *See id.*

Therefore, based upon the grammatical structure of the sentence, the gravamen of the offense is the request, command or attempt to induce another.

This conclusion is reinforced by the fact that nature of conduct oriented offenses generally use different verbs to show that different distinct types of conduct are intended to be punished. *See Young v. State,* 341 S.W.3d 417, 424 (Tex. Crim. App. 2011). The use of the disjunctive word "or" between the prohibited types of conduct also aids in determining the focus of the offense. *See Gonzales v. State*, 304 S.W.3d 838, 847 (Tex. Crim. App. 2010). The criminal solicitation statute contains three verbs that show the distinct types of conduct that are prohibited, and these three verbs are separated by an "or." *See* Tex. Pen. Code §15.03(a).

Therefore, the gravamen of the proscribed conduct is the request, command or attempt to induce and is therefore a nature of conduct oriented offense.

On the other hand, the subject of the criminal attempt statute is "a person." *See* Tex. Pen. Code §15.01(a) (West 2013). The verb of the criminal attempt statute is "does." *See id*. The direct object is "an act." *See id*.

A result of conduct offense generally requires a direct object for a verb to act upon. *Young*, 341 S.W.3d at 423. In this case, the direct object is necessary for the sentence to have any meaning.

The gravamen of the criminal attempt statute is the result that whatever the action taken, it tends but fails to effect the commission of the offense intended.

Unlike criminal solicitation, criminal attempt does not focus on specific types of conduct at all. Rather criminal attempt involves a multitude of possible actions that could be criminal *if* their result is to tend to effect the commission of the offense intended. If those actions do not have that result, the actions are not criminal.

Likewise several other factors support this conclusion. A person would have no notice of what the criminal attempt statute prohibited if the focus of the statute was on the nature of the conduct because the statute simply prohibits "an act." Rather, it is the result of this act that gives citizens notice of what constitutes wrongful conduct.

For example, in criminal solicitation, the act of requesting, commanding or attempting to induce someone to commit a felony is always bad, regardless of whether the person solicited acquiesces to the request. Additionally, the offense is completed upon utterance of the request, command or attempt to induce.

However, in attempted capital murder, the act of employing someone is only wrong because the result of that employment is that it becomes more likely that someone will wind up dead. Employment itself is not wrong. Only employment that has the specific result of tending to effect a murder is wrong.

Example of Deaf Hitman

The difference between the focus of the two statutes can be seen easily when considering a specific example such as a murder-for-hire case involving a deaf hit man.

A person could criminally solicit a deaf hit man to commit capital murder by verbally asking the hit man to kill someone for remuneration. As long as the suspect did not realize that the hit man was deaf, the criminal offense is complete at the moment that the solicitation occurred.[7] Even though the hitman cannot hear the solicitation and the solicitation therefore is completely useless from the perspective of actually employing the hitman, the act of soliciting is still wrong and punishable. Criminal solicitation is therefore a nature of conduct offense.

However, that exact same verbal request would not be criminal under an attempted capital murder theory. In order for that request to rise to the level of criminal attempt, there must also be proof that the verbal request had the result of tending but failing to effect the commission of capital murder. Without proof that verbally asking a deaf hit man to commit murder for hire would tend to accomplish a murder, no criminal attempt offense has occurred. Therefore, criminal attempt is a result oriented offense.

[7] The crime of solicitation may be committed merely by speaking. William R. LeFave, 2 Subst. Crim. L. §11.1 (2d ed.).

Case Law and the Gravamen of the Offenses in This Case

In addition to the "eighth grade grammar" rule, several cases have discussed the gravamen of the offenses involved in this case or similar types of offenses.

The Eleventh Court of Appeals did not address any of these cases, but instead cited to *Shelby v. State* and *Ex parte Benson*. *See Bien v. State*, --- S.W.3d ---, 2016 WL 859378, at *3 (Tex. App.—Eastland March 3, 2016, pet. granted). While both *Shelby* and *Ex parte Benson* are extremely instructive and helpful double jeopardy cases, neither address the gravamen of any offense relevant to this case. *See generally Ex parte Benson*, 459 S.W.3d 67 (Tex. Crim. App. 2015) (involving intoxication assault and felony driving while intoxicated); *Shelby v. State*, 448 S.W.3d 431 (Tex. Crim. App. 2014) (involving assault with a deadly weapon against a public servant and intoxication assault).

There has been discussion of the gravamen of criminal solicitation in case law, although none of that discussion provides binding authority. The conclusion in these discussions is that the focus is on the request, command or attempt to induce another to engage in specific conduct and that this solicitation was made with a specific intent. *Richardson v. State*, 681 S.W.2d 683, 689 (Tex. App.—Houston [14th Dist.] 1984) (Ellis, J., dissenting) *aff'd* 700 S.W.2d 591. *See Caldwell v. State*, 971 S.W.2d 663, 669 (Tex. App.—Dallas 1998, pet. ref'd)

(Chapman, J., dissenting).[8] This focus indicates a nature of conduct orientation for criminal solicitation.

On the other hand, murder is a result oriented offense. *Johnson v. State,* 364 S.W.2d 292, 298 (Tex. Crim. App. 2012). Capital murder is also a result-oriented offense. *Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991) (en banc). Likewise, attempted murder is a result-oriented offense. *Thompson v. State*, No. 05-99-01189-CR, 2000 WL 1337170, at *4-5 (Tex. App.—Dallas Sept. 18, 2000, no pet.).

Although no case law appears to have specifically addressed the gravamen of attempted capital murder, no logical reason exists for severing attempted capital murder away from the murder, capital murder and attempted murder cases.

Therefore, even though not dealing with the exact same offense, case law supports the conclusion that the Eleventh Court of Appeals' erred in holding that attempted capital murder is a nature of conduct oriented offense.

Criminal Attempt May Take on the Orientation of the Intended Offense

Even if criminal attempt cannot always be viewed as result oriented in every situation, case law also supports the conclusion that criminal attempt may take on

[8] Although these citations are to dissents, the majority opinions do not hold differently. In *Richardson,* the majority decision did not address the gravamen of criminal solicitation as the issue being resolved by the majority was whether the evidence was sufficient to corroborate an accomplice witness. *See Richardson v. State,* 681 S.W.2d 683, 686 (Tex. App.—Houston [14th Dist.] 1984) *aff'd* 700 S.W.2d 591. In *Caldwell*, the majority decision also did not address the gravamen of criminal solicitation as majority decision dealt with whether the indictment alleged an offense and jury charge error. *See Caldwell v. State*, 971 S.W.2d 663, 665 (Tex. App.—Dallas 1998, pet. ref'd).

the orientation of the intended offenses. In *Ex parte Milner*, this Court held that the criminal attempt statute does not define an allowable unit of prosecution and does not change the allowable unit of prosecution of the offense attempted. 394 S.W.3d 502, 508 (Tex. Crim. App. 2013). This Court decided that the offense of criminal attempt therefore would acquire its allowable unit of prosecution from the offense attempted. *Ex parte Milner,* 394 S.W.3d 502, 508-09 (Tex. Crim. App. 2013).

A fair inference from this conclusion in *Ex parte Milner* is that the criminal attempt statute may acquire its gravamen from the specific offense attempted. As capital murder and murder are both result oriented, *Ex parte Milner's* conclusion would then also support holding that attempted capital murder is result oriented.

Gravamen Conclusion

Because attempted capital murder should be viewed as a result oriented offense, the Eleventh Court of appeals erred in its analysis when it concluded that both offenses were nature of conduct oriented. As *Ex parte Benson* implies that offenses should not be found the same when they have different orientations, this error directly caused the court of appeals to err in overturning one of the conviction for violating double jeopardy.

This factor weighs heavily in favor of finding the offenses to be different. This factor certainly does not provide any evidence to rebut the presumption that the legislature intended to authorize multiple punishments.

The Gravamen of These Offenses Do Not Indicate Legislative Intent to Punish a Single Instance of Conduct

In addition to the focus of the gravamen of these offenses being different, significant evidence of legislative intent strongly supports the inference that the legislature did not intend to view criminal solicitation and attempted capital murder as one single instance of conduct.

Legislative intent should be regarded as absolutely determinative in considering whether a defendant's double jeopardy rights were violated. *See Gonzales v. State*, 304 S.W.3d 838, 847 (Tex. Crim. App. 2010).

A legislature may constitutionally separately punish each step leading to the consummation of a criminal transaction. *See Garrett v. U.S.*, 471 U.S. 883, 779 (1985).

Simply the codification of offenses in two distinct statutory provisions is, by itself, some indication of a legislative intent to impose multiple punishments. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015). Three distinct statutory provisions are at play in this case. *See* Tex. Pen. Code §§15.01, 15.03, 19.03

(West 2015). While criminal solicitation and criminal attempt are located within the same chapter of the penal code, the fact that they could have easily be written together into the same section, but were not, supports an inference that the legislature intended to treat them as separate offenses.[9]

Other states' judicial interpretations of their legislatures' intent demonstrates how a legislature must make policy decisions when drafting statutes about whether to regard solicitation and attempt as the same or different.

Years ago, the Supreme Court of Missouri held that the great weight of authority warranted the assertion that mere solicitation, unaccompanied by an act moving directly toward the commission of the intended crime, was not an overt act that could constitute an element of the crime of attempt. *State v. Davis*, 6 S.W.2d 609, 612 (Mo. 1928). That Court held that criminal solicitation is a distinct offense from criminal attempt *when declared so by law. Id.* (emphasis added).

Many years later, after the enactment of the Missouri Criminal Code by the Missouri legislature, that same Court recognized that the 1979 codification of criminal laws changed the offense of criminal attempt in Missouri to bring criminal solicitation within the statute that prohibited criminal attempt. *State v. Molasky*, 765 S.W.2d 597, 600-601 (Mo. 1989).

[9] The fact that criminal solicitation can only apply to capital and first degree underlying offenses also supports this inference. Because of the seriousness of these actions, the legislature has decided that solicitation is different from attempt at this high offense level. However, for lower level offenses, solicitation would be subsumed within the criminal attempt statute.

Importantly, in *Molasky,* the Missouri Supreme Court recognized that the legislature could have, but did not, enumerate criminal solicitation as a specific offense within the criminal code. *See id.* at 601.

Therefore, Missouri has recognized that a legislature can design a criminal statute to encompass both criminal attempt and solicitation, but does not have to do so.

Likewise, an appellate court in Connecticut has also recognized that the decision lies with the legislature as to whether criminal solicitation is to be treated as the same as criminal attempt. *See State v. O'Neil*, 782 A.2d 209, 216 (Conn. App. Ct. 2001) *aff'd* 811 A.2d 1288 (Conn. 2003). This court in Connecticut recognized also that most courts will answer no when determining whether a defendant's mere act of solicitation should be regarded as an attempt by the defendant to commit the offense. *Id*.

A court of appeals in Washington has explicitly held in a murder-for-hire case that, because solicitation involves no more than asking or enticing someone to commit a crime, solicitation alone would not constitute the crime of attempt in Washington. *State v. Gay,* 486 P.2d 341, 345 (Wash Ct. App. 1971, review denied). Two courts of appeals in Washington, applying this holding, have held that convictions for both attempted capital murder and criminal solicitation did not violate double jeopardy in murder-for-hire cases. *See State v. Dechant*, 192 Wash.

App. 1072, at *1, 3-5 (Wash. Ct. App. March 14, 2016, review dismissed) (unpublished opinion); *State v. Mockovak*, 174 Wash. App. 1076, at *1 (Wash. Ct. App. May 20, 2013, review denied) (unpublished opinion).

These show that criminal solicitation and criminal attempt, while related, do not necessarily involve the same conduct. Furthermore, these cases indicate that a legislature may choose to view the offenses as the same (and codify criminal solicitation as a method of committing criminal attempt by placing solicitation within the attempt statute) or may view the offenses as different (and codify each in its own section).

Therefore, considering that the Texas legislature chose to codify criminal solicitation separately from criminal attempt, this drafting decision provides extremely strong evidence that the legislature intended for these offenses to be considered different.

The court of appeals in this case held that the two offenses "punish Appellant for the same act—employment of Stephen Reynolds to kill Koh Box." *Bien v. State*, --- S.W.3d ---, 2016 WL 859378, at *3 (Tex. App.—Eastland March 3, 2016, pet. granted).

However, this conclusion conflicts the case law from other jurisdictions which recognized that solicitation is complete upon utterance of a request.

Such a conclusion also does not do justice to the elements of criminal solicitation as indicted in this case. The criminal solicitation indictment does not allege or imply that any actual employment of Stephen Reynolds occurred. *See* C.R. p. 18 – CR22320. Rather, the criminal solicitation indictment focuses on Appellant's actions of asking Stephen Reynolds to kill Koh Box.

This conclusion also runs contrary to the evidence presented in this case. Appellant was punished for two separate acts as shown by the evidence: (1) Appellant's request that Stephen Reynolds kill Koh Box, and (2) Appellant's actual employment of Stephen Reynolds through the transfer of payment. During the undercover video, Appellant solicited Stephen Reynolds to kill Koh Box:

> [APPELLANT]: I want it to look like -- like that mother fucker was just in the wrong place at the wrong time; his wallet missing, you know, something like that. What do you think? I mean, you tell me.
>
> DPS AGENT STEVE REYNOLDS: You're paying the money, brother. I can do it however you want.
>
> [APPELLANT]: I mean, you know, if that son of a bitch just gets popped in the head in front of his house or, you know, getting out of his truck at work and he ain't missing nothing, you know it's going to –
>
> DPS AGENT STEVE REYNOLDS: My only deal is I just need to know that's what you want and you don't want him just fucked up and scared, you want him fucking gone.
>
> [APPELLANT]: Yeah, I want him gone. State's Exhibit 22.[10]

[10] This portion of the transcript is contained on pages 14 and 15 of the transcript titled "Westerman picks up Bien 12/7/12" found in Court's Exhibit 1.

These actions alone are sufficient to constitute the offense of criminal solicitation. This exchange did not end the meeting however. After this discussion, Appellant actually paid the undercover officer to complete the "hit:"

> DPS AGENT STEVE REYNOLDS: All right. So you got me some operating money?
>
> [APPELLANT]: Yep. And I -- the rest of it you're going to have to give me time on it.
>
> DPS AGENT STEVE REYNOLDS: Okay. Well, I -- I –
>
> [APPELLANT]: I think I got that place sold.
>
> DPS AGENT STEVE REYNOLDS: Well, that's a good deal. But I told Mickey, you know, he vouched for you.
>
> [APPELLANT]: Yeah.
>
> DPS AGENT STEVE REYNOLDS: And, uh, you got me 500 here?
>
> [APPELLANT]: I believe that's what's there.
>
> DPS AGENT STEVE REYNOLDS: All right. There's a lot of fucking twenties. No, you've got more than 500 here.
>
> [APPELLANT]: Two, three, four, five –
>
> DPS AGENT STEVE REYNOLDS: That's five hundred right there, man.
>
> [APPELLANT]: Yeah, that's five.
>
> DPS AGENT STEVE REYNOLDS: You fucking give me your lunch money?
>
> [APPELLANT]: No. Go ahead and take what's there then.
>
> DPS AGENT STEVE REYNOLDS: You want me to take all of it?
>
> [APPELLANT]: Yeah.

DPS AGENT STEVE REYNOLDS: There's 700 right there.

[APPELLANT]: A thousand.

DPS AGENT STEVE REYNOLDS: Shit man, that's a cool thousand right there. I can operate on that. State's Exhibit 22.[11]

This action of paying the "hit man" tended but failed to effect the commission of capital murder and therefore constituted the offense of attempted capital murder. As these two actions are different, the court of appeals incorrectly determined that the offenses punished Appellant for the same act.

Likewise, this Court's decision in *Hobbs v. State* also supports a finding that the type of conduct at issue is different in each case. This Court held that an indictment for attempted capital murder alleging a promise to pay a hit man was fatally defective because a promise to pay is only a unilateral act of a defendant. *Hobbs v. State*, 548 S.W.2d 884, 886 (Tex. Crim. App. 1977). This Court determined that alleging a unilateral act of a defendant such as a promise to pay was not sufficient to allege that the act amounted to more than mere preparation that tends but fails to effect the commission of the offense intended. *Id*.

Therefore, the focus of the offenses in this case is not on the same conduct. This factor then should weigh strongly in favor of determining that the legislature intended to allow multiple punishments.

[11] This portion of the transcript is contained on pages 15-16 of the transcript titled "Westerman picks up Bien 12/7/12."

The Offenses are Not in the Same Statutory Section

The court of appeals did not explicitly recognize that the solicitation and attempt are not contained within the same statutory section, but they did appear to implicitly acknowledge this fact. *See Bien v. State*, --- S.W.3d ---, 2016 WL 859378, at *3 (Tex. App.—Eastland March 3, 2016, pet. granted). The court then glossed over this factor and jumped into a discussion of whether the offenses were phrased in the alternative without any conclusions about what weight to give the separate statutory sections. *See id*.

In light of the abundance of authority discussing the legislative ability to codify solicitation and attempt together or separately, the Texas legislature's decision to use separate statutes is extremely important and deserves great weight when attempting to determine legislative intent.

The court of appeals did properly recognize that while criminal attempt and criminal solicitation are contained within the same chapter of the penal code, attempted capital murder involves a statute not found in the "preparatory offenses" chapter. *See id*.

However, the court of appeals did not draw any inferences relating to legislative intent from this fact either.

This factor favors a finding that the legislature did intent to impose multiple punishments as multiple statutes are involved spanning two different chapters of the penal code.

The Offenses are Not Phrased in the Alternative

The Eleventh Court of Appeals correctly held that the offenses are not phrased in the alternative nor is there any language that would suggest that the legislature intended for the two offenses to be phrased in the alternative. *Id*. However, this finding was not considered to be support for legislative intent to impose multiple punishments. *See id.* Instead, the court simply stated that this factor was not dispositive to their analysis. *Id.*

At a minimum, this Court should acknowledge that although not necessarily outcome determinative, this factor still weighs in favor of finding legislative intent to impose multiple punishments.

The Offenses are not Named Similarly

The Eleventh Court of Appeals correctly held that the offenses are not named similarly, but again did not acknowledge that this provides at least some evidence of legislative intent to allow multiple punishments. *Id*. This factor

weighs in favor of finding legislative intent to impose multiple punishments and should be given at least some weight in the analysis.

The Offenses Do Not Have Common Punishment Ranges

The Eleventh Court of Appeals incorrectly held that the offenses have identical punishment ranges. *See id*.

While criminal solicitation and attempted capital murder have the same punishment range in this case, criminal solicitation and criminal attempt do not *necessarily* have the same punishment range. The differences in possible punishment ranges show legislative intent to treat these offenses as distinct and separate offenses.

The punishment range for the offense of criminal solicitation is a first degree felony if the offense solicited is a capital offense or a second degree felony if the offense solicited is a first degree felony. Tex. Pen. Code §15.03(d) (West, 2015). The punishment range for the offense of criminal attempt is one category lower than the offense attempted. Tex. Pen. Code §15.01(d) (West 2015).

When interpreting statutes, an appellate court should presume that every word has been used for a purpose and that each word, phrase, clause and sentence should be given effect if reasonably possible. *Crabtree v. State*, 389 S.W.3d 820,

825 (Tex. Crim. App. 2012). An appellate court should also presume that the legislature intended for the entire statutory scheme to be effective. *Id.*

The offense of criminal attempt applies to a much wider range of underlying offenses than criminal solicitation. Criminal solicitation only occurs if a defendant has an intent to commit a capital felony or a first degree felony. Tex. Pen. Code §15.03(a) & (d) (West 2015). However, criminal attempt applies if a defendant has a specific intent to commit any offense. Tex. Pen. Code §15.03(a) (West 2015). Therefore, the potential range of punishment on criminal attempt may be anywhere from a first degree felony all the way down to a Class C misdemeanor. Whereas the potential punishment range for criminal solicitation is only a first or second degree felony. *See* Tex. Pen. Code §15.03(d) (West, Westlaw through Sess. 2015).

The court of appeals did not give meaning to the words and phrases contained in range of punishment provisions for these offenses in the Penal Code, and the court therefore missed significant evidence of the legislature's intention to treat solicitation and attempt as different offenses.

There is no Imputed Liability at Issue

The court of appeals correctly held that there is no imputed theories of liability at issue in this case. *Bien v. State,* --- S.W.3d ---, 2016 WL 859378, at *4

(Tex. App.—Eastland March 3, 2016, pet. granted). Therefore, this factor is not helpful in this case.

Legislative History

It does not appear that a criminal solicitation to commit murder offense existed in common law in Texas.

It is not uncommon for there to be no statute making solicitation a crime in modern recodifications of criminal law. William R. LeFave, 2 Subst. Crim. L. §11.1 (2d ed.). The fact that the Texas legislature did choose to include solicitation in its codification should weigh in favor of finding legislative intent to make solicitation and attempt different offenses subject to multiple punishments.

How to Rule in This Case if the *Ervin* Analysis is Inconclusive

If an analysis of the *Ervin* factors is inconclusive after a *Blockburger* analysis gave rise to a presumption that the offenses are different and multiple punishments may be imposed, the presumption is therefore unrebutted. *Ex parte Ervin*, 459 S.W.3d 67, 73, 89 (Tex. Crim. App. 2015). The evidence must clearly show that the legislature's intent was only to impose one punishment in order to rebut that presumption. *Id*. at 89.

Assuming the worst case for the State, one cannot clearly say that the legislature intended for criminal attempt and criminal solicitation to be the same offense. *See id*. Therefore, this Court should reverse the court of appeals decision to find a double jeopardy violation and should therefore reinstate both convictions against Appellant.

ISSUE TWO

Assuming that Double Jeopardy is violated, the proper remedy is to retain the conviction for the "most serious offense" and set aside the other. *Ex parte Cavazos*, 203 S.W.3d 333, 337 (Tex. Crim. App. 2006). Determining which offense is "most serious" may be difficult and may not always be objective. *Id.* at 338.

Historical Development of the "Most Serious Offense" Test

The remedy for a Double Jeopardy violation is a judicially fashioned rule. *Landers v. State*, 957 S.W.2d 558, 559 (Tex. Crim. App. 1997) *overruled by Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006). The original case to begin shaping this rule, *Landers*, recognized four policy reasons in favor of retaining the "most serious offense:"

1) It applies to all cases;

2) It eliminates the arbitrariness of relying on how a statute is structured when the structure may have no necessary relationship to the seriousness of the offense;

3) It respects the fact that if the State had been made to elect between offenses, it would have chosen the most serious one;

4) It is most consistent with the objective of the Penal Code to ensure public safety through a deterrent influence. *See id.* at 560.

Originally, in *Landers*, this "most serious offense" test required that an appellate court determine which offense had the longest sentence imposed, with rules of parole eligibility and good time serving as a tie breaker. *See id*.

However, in *Ex parte Cavazos*, this Court changed the "most serious offense" test drastically.

To attempt to avoid an arbitrary determination of what the "most serious offense" is, this Court granted discretion to the finder of fact to make that determination. *See Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006). The Court determined that respect for the fact finder's decision occurs when an appellate court retains the offense of conviction for which the greatest sentence was assessed. *Id*. The Court further held that when the term of years assessed by the fact finder is the same in each case, an appellate court may then look to restitution as a tie-breaker. *Id*.

Ex parte Cavazos specifically rejected the consideration of other factors such as the degree of the felony, range of punishment, and rules governing parole

eligibility and award of good-conduct time in determining which offense is the "most serious offense." *Id*.

This dicta[12] from *Ex parte Cavazos* has created an untenable situation in which an appellate court has no basis at all for determining which offense is the "most serious" when the term of years, fine and restitution assessed are all the same.

Presiding Judge Keller predicted just such problems in her concurrence in *Ex parte Cavazos*. Judge Keller stated:

> Although purporting to disavow *Landers*, the Court's standard is identical to the one formulated in *Landers* except in one respect: the court categorically rejects ever using parole and good time consequences as a tie-breaker. But surely the Court cannot really mean that. What will the Court do (or recommend that trial courts and lower appellate courts do) if the sentences are identical, the fine and restitution imposed are identical, and the only distinction involves parole consequences, e.g. when one of the offenses is covered by Article 42.12, § 3g while the other is not? Do we look instead to the order in which the jury's verdict forms are submitted, the order in which the offenses appear in the penal code, or the cause numbers? Perhaps parole and good time consequences should not be the first tie-breaker, but it should be an available tie-breaker when the punishment is otherwise identical. *Id*. at 340 (Keller, J., concurring).

One year after *Ex parte Cavazos*, this Court dealt with a Double Jeopardy violation in a case where a jury assessed an identical term of years and fine for each conviction with no restitution assessed. *Villaneuva v. State*, 227 S.W.3d 744,

[12] *Ex parte Cavazos* did not involve a consideration of good time or parole eligibility. *See Ex parte Cavazos*, 203 S.W.3d 333, 340 (Tex. Crim. App. 2006) (Keller, J., concurring). Comments on how good time or parole eligibility should affect the outcome of *Ex parte Cavazos* were unnecessary to the holding. *Id.* at 340-41.

749 (Tex. Crim. App. 2007). In *Villaneuva*, this Court determined the "most serious offense" by looking to the trial court's affirmative finding of a deadly weapon in one case. *Id*.

The *Villaneuva* holding violated the rule that had just been announced because deadly weapon findings gain their value from their impact on a defendant's parole eligibility. *See* Tex. Code Crim. Proc. Art. 42.12, Sec. 3g (a)(2) (West 2015); Tex. Gov. Code §508.145(d)(1); George E. Dix & John M. Schmolesky, 41 Tex. Prac., Crim. Prac. & Proc. §19:16 (3d ed.).[13]

Therefore, although the *Villaneuva* decision did not explicitly mention 3g offenses or parole consequences, its decision did consider the effect of Article 42.12 Section 3g and the related parole consequences in determining which offense was the "most serious."

Yet one year later, in *Bigon* this Court faced again convictions with identical terms of years. *See Bigon v. State*, 252 S.W.3d 360, 373 (Tex. Crim. App. 2008). In *Bigon*, because the sentences were identical, the degree of felony of each offense was used as a tie-breaker to determine which sentence to retain. *Id.*

[13] A defendant whose judgment contains a deadly weapon finding is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less. Tex. Gov. Code §508.145 (d)(1) (West 2015). The general prison population, absent some other parole enhancing provision, is eligible for release on parole when the inmate's actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less. Tex. Gov. Code §508.145(f) (West 2015).

Presiding Judge Keller authored a dissent in *Bigon* which referred to the "practical impossibility of determining in some cases which offense is really the most serious…" *Id.* at 374 (Keller, J., dissent).

Current Problems Determining the "Most Serious Offense"

Several courts have commented on the problematic issues in this area.

The Thirteenth Court of Appeals noted in 2014 that a continuing lack of clarity exists in this area. *Almaguer v. State*, 492 S.W.3d 338, 348 (Tex. App.—Corpus Christi 2014, pet. ref'd). The Thirteenth Court also noted that recurrent problems occur when attempting to apply existing authority in different scenarios where the offenses are equal no matter which factors are applied to determine the "most serious offense." *Id*.

The Third Court of Appeals has ignored the *Ex parte Cavazos* language and held that "[w]hen two sentences are the same, other factors can be considered in determining which offense is the most serious offense." *See Cooper v. State*, No. 03-10-00348-CR, 2014 WL 3410587, at *1 (Tex. App.—Austin July 11, 2014, no pet.) (mem. op., not designated for publication).

Likewise, in another case, the Third Court of Appeals found the *Ex parte Cavanos* limitation so truly unworkable that it has construed *Villanueva* as a clarification that other factors are allowed to be considered if the application of the

length-of-sentence and restitution criteria prove to be indeterminate. *Williams v. State*, 240 S.W.3d 293, 301 (Tex. App.—Austin 2007, pet. ref'd).

At least two judges in this Court have suggested that:

> Consistent with Presiding Judge Keller's concurring opinion in *Cavazos*, it appears that this Court has since relaxed its "overruling" of *Landers* and will look to these other factors in the event that the finder of fact assesses the same sentence. *Duran v. State*, 492 S.W.3d 741, 753 (Tex. Crim. App. 2016) (Richardson, J., concurring).

However, because of the confusion regarding which precedent controls and how to interpret that precedent, sometimes appellate courts are following the strict requirements of *Ex parte Cavazos* and returning to the old first in time method of choosing which offense to retain. *See Barron v. State*, No. 03-11-00519-CR, 2013 WL 3929121, at *2 (Tex. App.—Austin July 26, 2013, no pet.) (mem. op., not designated for publication) (stating "We use the order of allegations in the indictment only if we cannot tell which is the more serious offense by reference to the punishment…" but vacating the judgment with the shorter sentence); *Ruth v. State*, No. 13-10-00250-CR, 2011 WL 3840503, at *8-9 (Tex. App.—Corpus Christi Aug. 29, 2011, no pet.) (mem. op., not designated for publication); *Fowler v. State*, 240 S.W.3d 277, 282 (Tex. App.—Austin 2007, pet. ref'd) (citing to *Williams v. State* as authority for following the first in time rule, although the citation appears to completely misquote the holding of *Williams*).

In at least one of these cases, this return to the first in time rule appears to have resulted from lack of any other options that are left in light of the confusion of case law. *See Ruth v. State*, No. 13-10-00250-CR, 2011 WL 3840503, at *8-9 (Tex. App.—Corpus Christi Aug. 29, 2011, no pet.) (mem. op., not designated for publication) (commenting that "In *Ex parte Cavazos*, however, the court of criminal appeals appears to have left one door open…. Because we face an unsettled question in the case before us and because the court of criminal appeals expressly declined to address the issue in *Ex parte Cavazos*, we choose to return to the approach favored by earlier case law and retain the first-indicted offense.").

This lack of consistency in the appellate courts demonstrates the unworkable nature of the "most serious offense" test as presently cobbled together. Should this Court reach this issue in this case, it should take the opportunity to provide a thorough and reasoned workable test that can be applied consistently.

This Court should avoid attempting to apply one more patch to the *Landers*/*Ex parte Cavazos* methodology.

What Is the Appropriate Method of Determining the "Most Serious Offense" When the Term of Years, Fine and Restitution Are the Same?

Because this is a judicially constructed rule designed to remedy a constitutional problem and the current method of applying the rule suffers from legitimate methodological criticisms, this Court should focus on the policies underlying the rule when clarifying how to determine the "most serious offense."

The irreconcilable differences contained within precedential cases governing this area supports focusing on policy arguments. Appellant will be able to cite to cases that imply that the "first in time" rule should be a tie breaker, while the State will be able to point to just as many cases that imply that factors such as parole eligibility, good conduct time and other collateral consequences should be the tie breaker. In determining which line of cases to follow, this Court should look to sound policy to support a workable framework.

The original *Landers'* rule was born out of and oriented around policy choices. Those policy factors and several others still apply to this area of law and strongly militate in favor of either (1) remanding a case for the prosecutor or trial court to determine the "most serious offense;" or (2) considering factors such as parole eligibility, good conduct time and other collateral consequences as tie breakers.

The First in Time Rule is Arbitrary and Unfair

Although this Court has not explicitly rejected the "first in time rule," *see Ex parte Cavazos*, 203 S.W.3d 333, 339 fn.8 (Tex. Crim. App. 2006), this Court should use this opportunity to explicitly reject all variations of this rule as arbitrary, unfair, unlikely to promote deterrence, and likely to grand a windfall to defendants.

The first in time rule, by whatever method it is implemented (first indicted, lowest cause number, first verdict form signed, etc.) is completely arbitrary. Cause numbers are generally assigned by deputy clerks in a clerk's office. Rarely, if ever, would a deputy clerk assess the seriousness of an offense before assigning cause numbers. A deputy clerk almost certainly would not have access to the facts underlying an offense when assigning cause numbers. While some deputy clerks may be aware of collateral consequences of certain types of offenses, such knowledge is certainly not required and unlikely to affect the cause number assigned.

Similarly, which verdict form is signed first can also be arbitrary. No law or rule requires a judge to submit separate offenses in a jury charge in a particular order. The order may be based upon cause numbers, complexity of the issues, a judge's whim, or any variety of other factors.

The first offense indicted may also depend on factors that are completely unrelated to the seriousness of an offense. Prosecutors may intentionally indict a less serious offense first while waiting on critical pieces of evidence, such as laboratory reports, interviews with additional witnesses, information obtained through subpoenas, etc., before indicting a more serious offense.

Additionally, both offenses could be indicted on the same day. Because of grand jury secrecy rules, an appellate court has no method to determine what order such cases were presented in.

Grand jury proceedings in the less serious offense could also bring to light evidence previously unknown that is critical to the prosecutor's decision to seek indictment on the more serious offense.

Because none of the methods of determining which offense came first in time relate to the seriousness of the offense, the result of creating a rule that determines the "most serious offense" by looking to which offense came first in time requires the suspension of all logical analysis and relies solely on luck.

The result of adopting such a rule would create an unfair situation for criminal defendants. Depending on these arbitrary factors, different defendants could have different convictions set aside even though they were initially convicted of the same offenses.

For example, considering Appellant's case, if the first in time rule were adopted based upon the cause numbers assigned, Appellant's conviction for attempted capital murder is the lower cause number and would therefore come first. Attempted capital murder is not a 3g offense, while criminal solicitation is a 3g offense. Therefore, if Appellant's "first" conviction were retained, Appellant would then become parole eligible faster under Section §508.145(f)[14] of the government code than if the criminal solicitation conviction were retained.

However, if another criminal defendant, charged with the same offenses happened to have his criminal solicitation offense as the lower cause number, that defendant would then be required to remain in prison longer under Section §508.145 (d)(1)[15] of the government code.

Constitutional protections such as double jeopardy should not end in such different results for similarly situated defendants without any cognizable reason for the difference.

This type of different result is not only unfair for the defendant who remains incarcerated longer based upon the same original convictions, it also creates an unfair windfall for the defendant who is released sooner.

[14] Allowing an inmate to become eligible for parole when the inmate's actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less.
[15] Requiring an inmate to wait until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less to become eligible for parole.

Juries in Texas are instructed on parole laws when determining sentences in felony cases. *See* Tex. Code Crim. Proc. Art. 37.07 Sec. 4 (West 2015). Therefore, a jury's verdict takes into account parole laws when assessing punishment. By eliminating the conviction that has the most stringent parole consequences, an appellate court will substitute an inconsequential fact (which offense has the lowest cause number) for a jury's assessment of a particular defendant's dangerousness to society or culpability for an offense.

None of the case law relied upon as the basis for the first in time rule provide any policy reason or justification for endorsing this rule. *See Ex parte Cravens*, 805 S.W.2d 790, 791 (Tex. Crim. App. 1991); *Ex parte Siller*, 686 S.W.2d 617, 620 (Tex. Crim. App. 1985) (en banc); *McIntire v. State*, 698 S.W.2d 652, 656 (Tex. Crim. App. 1985) (en banc).

Therefore, this particular rule's only benefit is its simplicity. However, simplicity should not be confused with or substituted for fairness. Deterrence is served most by a fair and just system, not one that is arbitrary and unfair.

What role should the trial court and prosecutors play?

The best possible method to create one test for the "most serious offense" that protects fairness, public safety, victims, and the integrity of the jury system is

to remand cases to the trial court and allow prosecutors to elect which offense to retain.

Sometimes, even after considering parole implications, good time credit, and other collateral consequences, offenses still appear to be equal on appellate review. *See Almaguer v. State*, 492 S.W.3d 338, 348 fn.2 (Tex. App.—Corpus Christi 2014, pet. ref'd); *Ruth v. State*, No. 13-10-00250-CR, 2011 WL 3840503, at *8 fn.7 (Tex. App.—Corpus Christi Aug. 29, 2011, no pet.) (mem. op., not designated for publication). However, allowing the State to elect which offense is the "most serious offense" would serve all four of the policies outlined in *Landers.*

Applies to All Cases

If this Court were to hold that determination of the "most serious offense" were to be made by a prosecutor, that rule has the ability to be applied consistently in all cases without exception. This rule would maintain the simplicity that is found in the first in time rule while eliminating the arbitrary nature of the rule.

Elimination of Arbitrary Decision Making

The laws of Texas vest in district and county attorneys the exclusive responsibility and control of criminal prosecutions. *Meshell v. State*, 739 S.W.2d 246, 255 (Tex. Crim. App. 1987) (en banc) (quoting *Baker v. Wade*, 743 F.2d 236,

242 and fn.28 (5th Cir. 1984)). An obvious corollary to a district or county attorney's duty to prosecute criminal cases is the utilization of his own discretion in the preparation of those cases for trial. *Id.* at 255.

When making original charging decisions, prosecutors consider the evidence, elements of the offense, parole consequences, victims' wishes, community standards, other collateral consequences such as enhanceability of future charges or deportation, and a myriad of other factors. This charging evaluation entails assessing the most serious prosecutable offense.

Allowing a prosecutor to determine which offense is the "most serious" post-conviction would ensure that the agency most frequently involved in such evaluations is able to apply the same criteria post-conviction that is being made pre-indictment. This also ensures a method of consideration of all of the factors that truly and actually make an offense the "most serious" instead of divorcing out certain factors that could be easily applied on appellate review (such as parole implications) from factors that almost certainly could not be applied on appellate review (such as the wishes of victims).

Remanding the cases to the trial court to allow election by a prosecutor in this situation simply respects the power already vested in prosecutors' offices to bear the responsibility for preparing and prosecuting criminal cases. Consistency

between pre-indictment evaluations of cases and post-conviction evaluation of cases eliminates arbitrary results.

State Would Elect Most Serious Offense if Given a Choice

Landers assumes that given a choice, the State would elect to go with the most serious offense. *See Landers v. State,* 957 S.W.2d 558, 560 (Tex. Crim. App. 1997) *overruled by Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006). Allowing a prosecutor to elect respects that presumption.

Public Safety

Perhaps most importantly, allowing prosecutors to elect which offense to retain protects public safety far more than any other option can.

When an appellate court truly cannot distinguish between offenses, there may be information a prosecutor possesses which would help appropriately determine which offense to retain. Appellate courts may not be privy to this information.

While appellate courts are familiar with most facts in cases, they are still limited to the record. Prosecutors have the benefit of being aware of evidence that may not have come into play during the trial as well having had personal interaction with the victims and witnesses. For example, prosecutors may have

information related to allegations of other offenses a defendant committed that the prosecutor could not put on during trial because of the unavailability of witnesses. Patterns in criminal activity may help shape a determination of which offense is the most serious when all other factors are the same.

Other Policy Reasons - Victims

Victims' wishes have a place in considering which offense is the "most serious."

Appellate courts rarely have direct contact with victims. One of the unique aspect of working as a trial attorney is meeting with persons who are victims of crimes and hearing from the victim personally why a particular crime was so heinous. Victims often have very particularized concerns about life after a trial is concluded that vary based upon their relationship to a defendant, their family situation, their economic situation, and their fear of retaliation. In family violence cases and sexual cases involving children, a conviction's effect on a custody battle is often extremely concerning to victims.

This case provides a perfect example of how criminal cases continue to affect victims post-conviction. Lori Evans, Koh Box's sister and Appellant's ex-wife, testified during the punishment phase of the trial. *See* R.R. Vol. 10, pp. 112-149. Lori testified about future impacts on her family:

Q. …what sort of impact has the things that Appellant has put you through, what kind of impact has that had on you?
A. I don't know how to live without living in fear. I don't know how that is going to be. No one knows how it is to live in fear for yourself and your family. I don't know how that is going to be. It's a huge impact.
Q. And you know that Michael's made threats that even if he is behind bars, he would have it done?
A. Yes.
Q. That still cause [sic] you to live in fear?
A. I will never not probably be a hundred percent feel safe. [sic]
Q. And all the --
A. I am scared the whole time I'm here to go the car, whatever, because you just never know.
Q. Is it fair to say that you will be looking over your shoulder from here on out?
A. Yes, sir. And my babies, my new baby.
Q. Do you think your family will, too?
A. Yeah, yes. You can't go through that and live that long of it and just think, oh, hey, jail will solve it. It's going to be an ongoing thing that you're constantly going to be fearful of. R.R. Vol. 10, pp. 204-05.

These concerns cannot be reduced into a ready-made one-size fits all rule, and arguably should not be confined into simplistic, talismanic rubrics. Some victims are trying as hard as they can to successfully move past a horrific experience while others are still caught in an on-going cycle. However, all victims deserve to be considered, even if their wishes are not outcome determinative.

Only by allowing the prosecutor to elect which offense to retain is there any hope of taking into account the desires of Lori Evans and other victims.

Allowing Prosecutors to Elect has Been a Successful Remedy

Multiple courts of appeals have been taking into account the prosecutors' elections when determining which offense is the "most serious."

The Thirteenth Court of Appeals when faced with this conundrum has followed Presiding Judge Keller's dissent in *Bigon* and remanded the cases to the trial court to allow the local prosecutor's office to elect which offense was the "most serious." *Almaguer v. State,* 492 S.W.3d 338, 348 (Tex. App.—Corpus Christi 2014, pet. ref'd).

The Fourth Court of Appeals appears to have also deferred to a prosecutor's election. *See Torres v. State,* No. 04-07-00873-CR, 2008 WL 5264869, at *4 (Tex. App.—San Antonio Dec. 17, 2008, pet. ref'd) (referencing the State's election contained within its appellate brief).

Based upon a footnote, it appears that the Third Court of Appeals likewise has deferred to the request of both parties in determining which conviction to retain. *See Cooper v. State,* No. 03-10-00348-CR, 2014 WL 3410587, at *2 fn. 3 (Tex. App.—Austin July 11, 2014, no pet.) (mem. op., not designated for publication).

In light of the adoption of this method by several courts of appeals and the policies this method supports better than any other method, this Court should hold that in order to determine the "most serious offense," an appellate court should

remand the case to the trial court to allow a prosecutor's office to elect which offense is the "most serious" and thus which offense should be retained.

Assuming That an Appellate Court will Determine the "Most Serious Offense," what Role Should Section 3g of Article 42.12 of the Code of Criminal Procedure Play?

Assuming that this Court is not willing to allow a prosecutor to elect the "most serious offense," this Court should, at a minimum, designate the parole implications of an offense being included within Section 3g of Article 42.12 of the Code of Criminal Procedure as a factor that may be considered by an appellate court in determining the "most serious offense" when the punishments imposed are the same.

Case law supports considering whether one of the offenses is a 3g offense. *See Villaneuva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007); *Williams v. State*, 240 S.W.3d 293, 301-02 (Tex. App.—Austin 2007, pet. ref'd).

While a determination of an offense's parole implications may occasionally be difficult, such an evaluation is usually quite straightforward which promotes consistency and fairness. The only factor likely to vary is whether an offense has been added or removed from Section 3g while a defendant is incarcerated. An appellate court should be fully capable of discussing the differences and assessing how those changes should affect the seriousness of an offense.

Retaining the 3g offense and vacating the non-3g offense also promotes public safety by ensuring that the offense with the strictest parole eligibility rules is retained.

Retaining the 3g offense and vacating the non-3g offense is also intellectually honest. It is fundamentally true that offenses that require a person to remain in prison longer before becoming parole eligible are more serious than other offenses. While intellectual honesty is rarely discussed in appellate decisions, the State believes that truth is the bedrock upon which our whole system is built. Justice requires honesty, not arbitrariness.

Therefore, at a minimum, the State asks this Court to explicitly hold that if the punishment assessed is equal, an appellate court be allowed to consider which offense is a 3g offense under Article 42.12 of the Code of Criminal Procedure when determining the "most serious offense."

Should This Court Consider Any Alternative Remedies?

In Appellant's Petition for Discretionary Review, he asks that *both* convictions be *reversed* to allow the State to elect which offense it wished to pursue and therefore require the State to hold a brand new trial. *See Appellant's Petition for Discretionary Review*, p. 8.

While the State has joined Appellant in asking for review of how to determine the "most serious offense" because of lack of clarity in case law, the State believes that there is absolutely no support for claiming that both convictions should be reversed.

Settled case law indicates that when a double jeopardy violation is found, the conviction for the "most serious offense" is retained and the other conviction is set aside. *E.g., Shelby v. State*, 448 S.W.3d 431, 440 (Tex. Crim. App. 2014); *Ex parte Denton*, 399 S.W.3d 540, 547 (Tex. Crim. App. 2013); *Ex parte Cavazos*, 203 S.W.3d 333, 337 (Tex. Crim. App. 2006). Even with the disagreement about how to determine the "most serious offense," no case law indicates that retaining one conviction is problematic.

To completely change this settled remedy would not promote judicial economy, would subject victims to ongoing stress and uncertainty, and would not promote public safety.

PRAYER FOR RELIEF

Therefore, the State requests that this Court reverse the Eleventh Court of Appeals decision and affirm both convictions. If this Court does determine that there was a Double Jeopardy violation, the State asks that this Court affirm the criminal solicitation conviction as the "most serious offense."

Respectfully submitted,

/s/ELISHA BIRD

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Keith S. Hampton, Attorney at Law and Cynthia L. Hampton, Attorney at Law, 1103 Nueces Street, Austin, Texas 78701, on the 31st day of October, 2016.

/s/ELISHA BIRD
Elisha Bird
Assistant District Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed by U.S. Mail to Lisa McMinn, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on the 31st day of October, 2016.

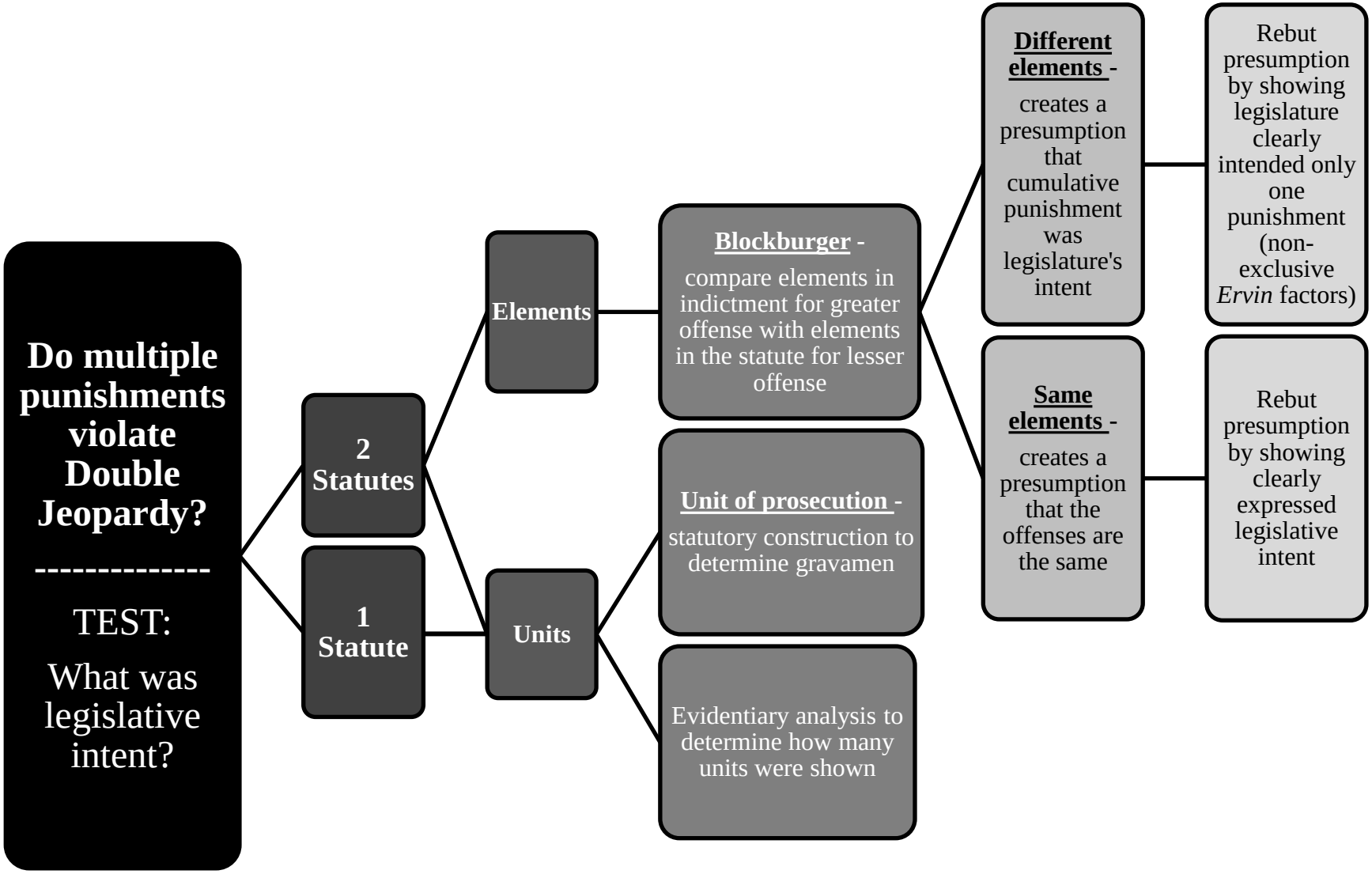
/s/ELISHA BIRD
Elisha Bird
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 13,577 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ELISHA BIRD
Elisha Bird
Assistant District Attorney

APPENDIX A – VISUAL SUMMARY OF DOUBLE JEOPARDY ANALYSIS DRAWN FROM *EX PARTE BENSON*


Do multiple punishments violate Double Jeopardy?

TEST:
What was legislative intent?
2 Statutes
1 Statute
Elements
Units
Blockburger - compare elements in indictment for greater offense with elements in the statute for lesser offense
Unit of prosecution - statutory construction to determine gravamen
Evidentiary analysis to determine how many units were shown
Different elements - creates a presumption that cumulative punishment was legislature's intent
Same elements - creates a presumption that the offenses are the same
Rebut presumption by showing legislature clearly intended only one punishment (non-exclusive *Ervin* factors)
Rebut presumption by showing clearly expressed legislative intent

APPENDIX B – ELEVENTH COURT OF APPEALS' DECISION

Opinion filed March 3, 2016

In The

Eleventh Court of Appeals

Nos. 11-14-00057-CR & 11-14-00058-CR

MICHAEL JOSEPH BIEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause Nos. CR22319 & CR22320

O P I N I O N

The jury convicted Michael Joseph Bien of the offenses of criminal attempt—capital murder (Cause No. CR22319) and criminal solicitation to commit capital murder (Cause No. CR22320) and assessed Appellant's punishment for each offense at confinement for life. *See* TEX. PENAL CODE ANN. §§ 15.01, 15.03 (West 2011), § 19.03 (West Supp. 2015). The trial court ordered that the sentences were to run

concurrently. We affirm the judgment in Cause No. CR22320 and reverse the judgment in Cause No. CR22319.

Appellant presents two identical issues in each appeal. In his first issue, Appellant argues that the trial court erred when it authorized the jury to return multiple verdicts for the same offense. Appellant contends that his convictions violate the Double Jeopardy Clause of the United States Constitution and the Texas constitution. In his second issue, Appellant complains that the evidence is insufficient to support the convictions because the State failed to refute Appellant's entrapment defense.

Appellant asks this court to decide this appeal under the Texas constitution rather than under the federal constitution. Appellant details the textual differences between the double jeopardy provisions of each constitution, but concedes that the result would be the same under either constitution. Further, we have previously said that the Texas constitution's double jeopardy clause does not provide broader protection than the federal constitution. *In re Morris*, No. 11-05-00381-CR, 2006 WL 1431122, at *2 n.1 (Tex. App.—Eastland May 25, 2006, pet. ref'd) (not designated for publication); *Ex parte Beeman*, 946 S.W.2d 616, 617 (Tex. App.—Fort Worth 1997, no pet.). Accordingly, our analysis is the same under both constitutions.

Under the U.S. Constitution, the Double Jeopardy Clause provides, in part, that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Double Jeopardy Clause protects criminal defendants from three things: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense." *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

The double jeopardy protections are fundamental in nature. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). Because they are fundamental in nature, a double jeopardy complaint may be raised for the first time on appeal when (1) the undisputed facts show that a double jeopardy violation is clearly apparent on the face of the record and (2) enforcement of the usual rules of procedural default would serve no legitimate state interests. *Id.* Here, Appellant did not raise a double jeopardy issue either during trial or when he was sentenced. Thus, we must first decide whether Appellant can raise a double jeopardy argument for the first time on appeal or whether that right has been waived. *See id.*

In this case, the record is fully developed. *See Saenz v. State*, 131 S.W.3d 43, 50 (Tex. App.—San Antonio 2003), *aff'd*, 166 S.W.3d 270 (Tex. Crim. App. 2005). Appellant stood trial for both offenses before the same judge and jury. Therefore, the trial court either knew or should have known of a possible double jeopardy issue. *See id.* Additionally, we have received the complete record of the trial, and we can resolve Appellant's jeopardy claims based on the record presented. There is no need for further proceedings to add new evidence to the record. *See id.* Appellant has satisfied the first prong of the *Gonzalez* test. *See Gonzalez*, 8 S.W.3d at 643.

In regard to the second prong of the *Gonzalez* test, enforcement of the usual rules of procedural default, in this case, would serve no legitimate state interests. The appropriate remedy for any double jeopardy violation is to affirm the conviction for the "most serious" offense and vacate any other conviction that is in violation of the double jeopardy clause. *Ex parte Cavazos*, 203 S.W.3d 333, 338–39 (Tex. Crim. App. 2006). An effective double jeopardy challenge would not require a retrial or a remand to the trial court; therefore, there are no legitimate state interests that would be negatively impacted if Appellant is allowed to raise his double jeopardy claim for the first time on appeal. *See Saenz*, 131 S.W.3d at 50. Thus, Appellant has satisfied

the second prong of the *Gonzalez* test, and we will review the merits of the double jeopardy issue. *See Gonzalez*, 8 S.W.3d at 643.

The first step in a double jeopardy challenge is to determine whether criminal solicitation to commit capital murder and attempted capital murder are the "same offense." *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App 2008). When multiple punishments arise out of one trial, we begin our analysis with the *Blockburger* test. *Id.*; *see Blockburger v. United States*, 284 U.S. 299 (1932). "Under the *Blockburger* test, two offenses are not the same if one requires proof of an element that the other does not." *Bigon*, 252 S.W.3d at 370. To resolve a double jeopardy issue, we look at the elements alleged in the charging instrument. *Id.*

Appellant was charged under two indictments, and each indictment alleged a separate and distinct offense that took place on or about December 7, 2012. The allegations in the indictment for criminal solicitation to commit capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with intent that capital murder, a capital felony, be committed
- did request, command, or attempt to induce
- Stephen Reynolds
- to engage in specific conduct
- to-wit: kill Koh Box
- for remuneration, and
- that under the circumstances surrounding the conduct of the defendant or Stephen Reynolds, as the defendant believed them to be, would have constituted capital murder.

The allegations in the indictment for attempted capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with the specific intent to commit the offense of capital murder of Koh Box

- did do an act
- to-wit: employ Stephen Reynolds
- by remuneration or the promise of remuneration
- which amounted to more than mere preparation
- that tended but failed to effect the commission of the offense intended.

In comparison, the two charges are similar, but not the same. In order to obtain a conviction for criminal solicitation to commit capital murder, the State must prove that Appellant did "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. On the other hand, in order to obtain a conviction for attempted capital murder, the State must prove that Appellant employed Stephen Reynolds by remuneration or the promise of remuneration, which amounted to "more than mere preparation." Under a strict application of the *Blockburger* test, the two offenses have differing elements and, therefore, would not be the same offense. However, the *Blockburger* test is a rule of statutory construction and is not the exclusive test to determine whether the two offenses are the same. *Bigon*, 252 S.W.3d at 370.

In *Ervin v. State*, the court provided a nonexclusive list of factors to consider when analyzing a multiple-punishment claim. 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Those factors include whether the offenses are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are similarly named, whether the offenses have common punishment ranges, whether the offenses have a common focus ("gravamen"), whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the same under *Blockburger*, and whether there is legislative history that contains an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin*, 991 S.W.2d at 814. However, the ultimate question is whether the legislature intended

to allow the same conduct to be punished under both of the offenses. *Bigon*, 252 S.W.3d at 371.

Criminal solicitation and criminal attempt are both in the "preparatory offenses" chapter under the "Inchoate Offenses" title of the Texas Penal Code. *See* PENAL ch. 15 (West 2011 & Supp. 2015). However, in this case, criminal attempt also requires the application of Section 19.03, which is the applicable statute for the underlying felony of capital murder. *Id.* § 19.03. Additionally, while the two charged offenses are in the same chapter of the Penal Code, they are not phrased in the alternative, and there is no language in either statute that suggests that the legislature intended the two offenses to be phrased in the alternative. *See Ex parte Benson*, 459 S.W.3d 67, 78–79 (Tex. Crim. App. 2015). Because criminal solicitation and attempted capital murder are not phrased in the alternative, this factor is not dispositive in this case. *Bigon*, 252 S.W.3d at 371.

Offenses are similarly named if they share a common word in the title. *Ex parte Benson*, 459 S.W.3d at 79. Here, the titles share only the word "criminal." PENAL § 15.01 (Criminal Attempt), § 15.03 (Criminal Solicitation). In *Garfias v. State*, the defendant was charged with aggravated robbery by threat and aggravated assault causing bodily injury. 424 S.W.3d 54, 56 (Tex. Crim. App 2014). The court said that those two offenses were not named similarly. *Id.* at 61. Here, the general nature of "criminal" in the name of the offenses charged is similar to the use of "aggravated" in the name of the offenses charged in *Garfias*. Thus, the two offenses are not similarly named.

The two offenses in this case have identical punishment ranges. Criminal solicitation to commit capital murder and criminal attempt—capital murder are both first-degree felonies, and both offenses carry a punishment range of five to ninety-nine years or life, with a possibility of a fine up to $10,000. Thus, this factor supports a finding that the two offenses are the "same."

The focus, or "gravamen," of the two offenses is a key factor in the *Ervin* analysis. *Garfias*, 424 S.W.3d at 59. Here, each offense has a similar focus. The focus for criminal solicitation to commit capital murder is to "request, command, or attempt to induce" Stephen Reynolds to kill Koh Box for remuneration. The focus of attempted capital murder is to do an act—employment of Stephen Reynolds by remuneration—which amounted to more than mere preparation in an attempt to kill Koh Box. Further, both offenses have the same *type* of focus. *See Ex parte Benson*, 459 S.W.3d at 81 (holding that felony DWI and intoxication assault are not the "same" for double jeopardy purposes because they have two different focuses and two different types of focuses). In addition, the two offenses are conduct oriented and, in this case, punish Appellant for the same act—employment of Stephen Reynolds to kill Koh Box. *See Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App 2014). Specifically, the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box. Thus, the focus of each offense tends to indicate a single instance of conduct and weighs heavily in favor of treating the offenses as the same for double jeopardy purposes. *Id.*

The last two *Ervin* factors are not applicable in this case. There are no imputed theories of liability at issue, and there is no legislative history with respect to the legislature's intent to treat the offenses the same. *See id.* at 440. Based upon our application of the *Blockburger* test and the *Ervin* factors, we hold that Appellant's double jeopardy rights were violated when he was convicted of both criminal solicitation to commit capital murder and criminal attempt—capital murder. Appellant's first issue is sustained.

The remedy for a double jeopardy violation is to affirm the conviction for the "most serious" offense and vacate the other conviction. *Bigon*, 252 S.W.3d at 372. The "most serious" offense is the offense for which the greatest sentence was assessed. *Ex part Cavazos*, 203 S.W.3d at 338. In this case, the same term of years

was assessed for each conviction—confinement for life. Additionally, both offenses are first-degree felonies. Because the sentences and the degree of felony is the same for both offenses, we must examine the rules governing parole eligibility and the good-conduct time. *See Bigon*, 252 S.W.3d at 372–73. Here, criminal solicitation is a "3g" offense and attempted capital murder is not. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)(K) (West Supp. 2015). A "3g" offense limits a trial court's ability to suspend a defendant's sentence and also affects parole eligibility. *See Shankle v. State*, 119 S.W.3d 808, 813–14 (Tex. Crim. App. 2003); *see also* TEX. GOV'T CODE ANN. § 508.145(d) (West Supp. 2015). Because criminal solicitation to commit capital murder is the "most serious" offense, we will uphold that conviction and vacate the conviction for criminal attempt—capital murder.

In Appellant's second issue, he argues that the evidence shows that Mickey Westerman, Appellant's childhood friend, induced and encouraged Appellant to proceed as Appellant did. Appellant thus asserts that he was entrapped, that the State did not refute the entrapment evidence beyond a reasonable doubt, and that the evidence was insufficient to support both convictions.

To review the jury's rejection of an entrapment defense, we review the sufficiency of the evidence. *Hernandez v. State*, 161 S.W.3d 491, 500 (Tex. Crim. App. 2005). We review all the evidence in the light most favorable to the verdict, and we will affirm the conviction if, after reviewing all the evidence in the light most favorable to the verdict, we find that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against Appellant on the entrapment issue beyond a reasonable doubt. *Id.*

Entrapment is a defense to prosecution if (1) the defendant engaged in the conduct charged (2) because he was induced to do so by a law enforcement agent (3) who used persuasion or other means and (4) those means were likely to cause persons to commit the offense. PENAL § 8.06(a). A defendant has the initial burden

to produce evidence that raises the defense of entrapment, but when he does, the burden of persuasion shifts to the State to disprove the defense beyond a reasonable doubt. *Hernandez*, 161 S.W.3d at 498.

Entrapment includes both a subjective and an objective component: the defendant must show both that he was actually induced to commit the charged offense and that the persuasion was such as to cause an ordinarily law-abiding person of average resistance to commit the crime. *England v. State*, 887 S.W.2d 902, 913–14 (Tex. Crim. App. 1994). "Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." PENAL § 8.06(a).

Westerman became friends with Appellant in junior high school. After Westerman dropped out of school, he only "ran into" Appellant a couple of times, and the last time was around 2000. In 2005, Westerman and Appellant began to work together in the Irving area, and while Westerman was working with Appellant, he lived in Appellant's horse trailer on Appellant's property in Ponder. While living on Appellant's property, Westerman became acquainted with Lori, Appellant's ex-wife. She often cooked supper for Westerman. Westerman worked with Appellant until Westerman moved back to Brownwood in the summer of 2005.

Westerman had not seen Appellant since 2005 and had only spoken with him three or four times after Westerman moved from Ponder. However, in March 2012, after three years with no contact, Appellant called Westerman. Based on what Appellant told him during the phone call, Westerman believed that Appellant wanted to kill Lori. Westerman called Lori to discuss the conversation that he had had with Appellant. Westerman advised Lori to call the authorities in Pecos where she lived. Lori told Westerman that she had expected Appellant to do "something like this."

Shortly after Westerman's phone call to Lori, he received a call from the chief of police in Pecos. Westerman told the chief of police that he was going to call Appellant back in a few days to make sure he was not just angry and talking "outside

of his head" and that he would call the chief of police as soon as he talked to Appellant again. In Westerman's phone call to Appellant, Appellant made it clear to Westerman that who he actually wanted to kill were Lori's parents, Gale and Hugh Box. Westerman testified that he tried to talk Appellant out of it, but it seemed that he was set on killing Gale and Hugh Box. Appellant told Westerman that he had a plan but that he did not want to talk about it on the phone. Appellant expressed to Westerman that he wanted Westerman to help find someone to "get this done." Westerman testified that he did not know why Appellant called him other than perhaps Appellant thought that he could trust him because of their history of drug use together.

Texas Ranger Danny Briley was assigned to work with Westerman. Ranger Briley and Westerman met to discuss general instructions about protocol and what Ranger Briley expected of Westerman. Westerman explained that, from that point on, he was to contact Ranger Briley before he answered any calls or responded to any texts from Appellant to ensure that communications could be documented, recorded, or supervised. Ranger Briley was present for phone calls between Westerman and Appellant so that it could be shown what had transpired throughout the investigation. Ranger Briley explained to Westerman that he was not to instigate the commission of an offense but, rather, was only there to give Appellant the opportunity to make his own plans.

Ranger Briley testified that Westerman performed exceptionally well as a confidential informant and was the best informant that he had ever seen. Ranger Briley explained that he gave Westerman guidelines of what he should or should not say during phone calls with Appellant. Ranger Briley stated that he wanted the communication to be in a format that would allow them to determine what Appellant really wanted and would also allow Appellant the opportunity to back out completely.

At trial, the State presented recorded phone conversations between Westerman and Appellant as well as voicemails left by Appellant on Westerman's phone. In one of the phone calls, Appellant can be heard telling Westerman, "I gotta plan how to make this deal work," and Appellant expanded on what that plan was. In another phone conversation, Appellant discussed ideas on how to make Gale and Hugh disappear. He even suggested that he could personally dig a hole with a backhoe to help with the plan.

Stephen Reynolds, an agent with the Texas Department of Public Safety, posed as a "hit man." The face-to-face interactions between Agent Reynolds and Appellant were recorded, and the recordings were presented at trial. In the first meeting between "the hit man" and Appellant, Appellant discussed how he could get the money to pay for the "hit." Those ideas included selling his guns, getting a loan from Westerman, getting a loan from his mom, and selling his land and making payments to "the hit man" from the proceeds of the sale. Ranger Briley stated that the idea that Westerman loan Appellant the money originated with Appellant, not Westerman.

At some point during the investigation, Appellant went to jail for approximately six months, and the investigation stalled. However, on the day Appellant got out of jail, he called Westerman and expressed his intent to continue with his plan to hire a hit man, but this time, he said that his target was now Koh Box, Gale and Hugh's son and Lori's brother. Westerman testified that Appellant told him that "Koh Box never done me no wrong. I just want [Gale and Hugh] to pay." Appellant apparently blamed Gale and Hugh for problems Appellant had with custody issues that involved his children.

Agent Reynolds testified that, after Appellant changed his mind about the desired target of the hit, Appellant drew a map to show the location of Koh Box's house. Agent Reynolds wrote notes on the drawing of the map based on the

conversation that he had with Appellant. The notes included the name of the street where Koh Box lived, a business that Koh Box owned, and vehicle descriptions. Before the initial meeting concluded, Agent Reynolds gave Appellant an opportunity to back out. He asked Appellant if he just wanted him to hurt Koh Box or if he wanted him gone, and Appellant responded, "I want him gone."

In the final meeting between Appellant and Agent Reynolds, Appellant gave one thousand dollars to Agent Reynolds to kill Koh Box. Agent Reynolds explained that he again gave Appellant an opportunity to back out, but Appellant again stated, "No, I want him gone." Agent Reynolds testified that Appellant did not appear to have any reservations about the final plan.

Although Appellant did not testify at trial, he concedes on appeal that the plan to kill Koh Box originated with him, but he argues that he had "cooled" to the idea. He asserts that he probably would not have gone through with it if Westerman had not encouraged him. Appellant also states that Westerman made him fearful of what might happen if he did not pay the hit man. Appellant cites to Ranger Briley's testimony that Westerman had told Appellant that Westerman had been "scolded" by "the hit man" because Appellant could not pay the money. Appellant also cites to the fact that Westerman told him that "it would be less obvious" if Appellant did it now rather than wait six months as suggested by Appellant.

But Ranger Briley testified that Appellant's prevailing concern was that Appellant did not want it to come back to him. He also indicated that Appellant never tried to "put the brakes" on the plan. Additionally, Appellant had months to "cool off" while, as we have noted, he was in jail on an unrelated charge. Instead, Appellant called Westerman the day he got out of jail to tell him to find a hit man soon.

The State argues that the evidence was sufficient to support the jury's rejection of Appellant's entrapment defense. A jury is authorized to weigh the evidence and

decide whether the evidence establishes entrapment. *Hernandez*, 161 S.W.3d at 500. We agree with the State. When viewed in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to support the convictions and the rejection of Appellant's entrapment defense. Appellant's second issue is overruled.

We vacate Appellant's attempted capital murder conviction in Cause No. CR22319 because that conviction violates the Double Jeopardy Clause of the U.S. Constitution. Accordingly, we reverse the judgment of the trial court in Cause No. CR22319, and we render a judgment of acquittal. *See Saenz*, 131 S.W.3d at 53. We uphold Appellant's criminal solicitation conviction and affirm the judgment of the trial court in Cause No. CR22320.

JIM R. WRIGHT
CHIEF JUSTICE

March 3, 2016

Publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.